IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 271.

ALCOA STEAMSHIP COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION AND CONSENT TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF WATERMAN STEAMSHIP CORPORATION AS *AMICUS CURIAE*.

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Counsel for Waterman Steamship Corporation as Amicus Curiae.

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Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A

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Citations.

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MOTION FOR LEAVE TO FILE BRIEF AS *Amicus Curiae*.

Upon the annexed consent of counsel for the respective parties hereto, the undersigned, as counsel for Waterman Steamship Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*.

L. DE GROVE POTTER,
Counsel for Waterman Steamship
Corporation as *Amicus Curiae*.

SUPREME COURT OF THE UNITED STATES,

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ALCOA STEAMSHIP COMPANY,
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Respondent.

CONSENT TO FILING BRIEF AS *Amicus Curiae*.

The undersigned counsel for the respective parties hereto consent to the filing of a brief as *Amicus Curiae* by L. de Grove Potter, as counsel for Waterman Steamship Corporation.

Dated: November 8, 1949.

MELVILLE J. FRANCE,
Counsel for Alcoa Steamship Company

PHILIP B. PERLMAN,
Solicitor General of the United States.

Supreme Court of the United States

October Term, 1949.

No. 271.

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Respondent.

BRIEF AS *AMICUS CURIAE* ON BEHALF OF WATERMAN STEAMSHIP CORPORATION.

Statement.

Because of its interest in the question presented, as outlined in its brief submitted as *amicus curiae* on the Petition for Certiorari, Waterman Steamship Corporation submits this brief in support of the contention of the petitioner that it is entitled to ocean freight under such circumstances as here involved.

The essential facts are that the Government shipped cargo on petitioner's vessel under the Government form bill of lading which incorporated the terms and conditions of the carrier's usual form. During the voyage the vessel was torpedoed and sunk. As a result the cargo was lost and not delivered to destination.

The Question Presented.

The question presented is whether the terms of the Government form bill of lading, use of which is necessary in the carriage of Government cargo, whether by land or by sea, exempt the Government from the liability for freight which private shippers almost invariably are under when a carrier of the cargo to destination is prevented by causes for which the carrier is not responsible. The determination of the question depends on the proper interpretation of the Government form of bill of lading read in conjunction with the customary provision appearing in commercial bills of lading of ocean carriers that freight is earned on shipment of the goods, such customary provisions being incorporated by reference into the Government bill of lading as part of the contract of carriage.

The Importance of the Question.

The importance of the questions raised transcends the rights and liabilities of the parties presently before the Court. The Government form bill of lading in question is one which all carriers are required to adopt in the transportation of Government cargo. For many years the Government has considered that under documents such as here involved it was liable for freight even though the carrier was unable to deliver the cargo. 24 Dec. Comp. Treas. 707 (1918) and 21 Comp. Gen. 909 at 913 (1942). Ocean carriers have been guided accordingly in establishing rates and arranging insurance. The transportation of Government cargo heretofore has followed the usual commercial practices involving the same incidents as exist in transporting cargo of private shippers by sea.

By now reversing its position the Government seeks favored treatment and, if successful, ocean carriers generally will be required to revise rate structures and insurance coverage.

Certainly, in view of this background, the Court should not overthrow what has been the well established and the customary basis on which both commercial and Government cargoes have been carried by sea for many years past unless the contract of the parties clearly requires so doing. It is submitted the contract clearly does not require such interpretation and Waterman Steamship Corporation is in full accord with the contentions of the petitioner as set out in its brief. However, it wishes briefly to state certain additional arguments and authority on some of the points involved.

POINT I.

THE HISTORY AND PROVISIONS OF THE GOVERNMENT BILL OF LADING REFUTE THE GOVERNMENT'S CONTENTIONS.

The Government bill of lading was prescribed by the Comptroller General pursuant to authority contained in Title 31, U. S. Code, Sections 49 and 52 (f) (Cf. Title 4, Code of Federal Regulations, Part 8, Section 8.1). The authority granted the Comptroller General was to prescribe forms, systems and procedures "for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officer's accounts and claims against the United States". He is also empowered to make "such rules and regulations as may be necessary for carrying on the work of the General Accounting Office * * *".

These grants of authority do not carry with them power to prescribe the terms and conditions on which other governmental officers and agencies may contract in the Government's behalf. In his opinion on Government Bills of Lading (36 Ops. Att'y. Gen. 289), the Attorney General pointed out:

> "Under sections 309 and 311 (f), *supra,* the Comptroller is authorized to prescribe by General Regulations the forms to be used in 'Administrative appropriation and fund accounting in the several Departments and establishments,' but no authority is granted by these provisions to limit by Regulation or by the adoption of Standard Forms the authority vested in other officers of the Government to make lawful contracts in its behalf. This conclusion appears to be quite obvious on the face of the statute. It is as clearly supported by the legislative history. * * *
>
> * * * * * *
>
> "Of course, the bill of lading is an instrument which in addition to evidencing the contract of carriage must serve a secondary purpose in connection with Government accounting, and for such purposes no doubt the Comptroller General may prescribe its form, provided he does not undertake to impose contractual obligations upon the parties which they are legally entitled to negotiate. In its use for the purpose of 'administrative appropriation and fund accounting in the several departments and establishments' of the Government, the form of bill of lading, after its contractual terms and conditions have been agreed upon, is, by virtue of Sec. 309 of the Budget and Accounting Act, subject to the approval of the Comptroller General as a form for accounting purposes; but such approval can not in any way extend to the contractual obligations, which the parties are

entitled freely to negotiate without dictation from the Comptroller General, whose function is that of an accounting officer."

In view of the foregoing, it is fair to assume that in prescribing the form of the Government bill of lading the Comptroller General was concerned only with the establishment of forms and procedures for his accounting purposes. It was not his duty nor within his power to determine or prescribe the terms and conditions on which other Government agencies should contract.

Viewed in this light it is apparent that one of the chief purposes of the Government bill of lading is to serve the auditing purposes of the Comptroller General. As will be seen from an analysis of the various provisions of the Government bill of lading, so far as it sets forth any agreement between the parties it is largely a skeleton adopting by reference "* * * the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier".

In analyzing the Government form the first point to be noted is the langauge on its face: "Received from by the public property hereinafter described, * * * to be forwarded subject to the *conditions* stated on the reverse hereof * * *". (Italics supplied)

On the reverse side certain clauses are specifically labelled "Conditions". Others are labelled "Instructions" and still others "Directions". It is submitted that only the "Conditions" form the contract between the parties. All else must be considered as serving only the purposes of the Comptroller General. Hence resort to "Instructions" to determine or interpret the substance of the agreement between the parties is not justified.

Furthermore, examination of the Government form indicates that it was prepared principally with rail transportation in mind. On its face spaces are provided to indicate "size of car ordered", "size of car furnished", "Car No. ". Condition 1 on the reverse side states "payment will be made to the last carrier". Nowhere in the form is space provided for the name of a vessel, which is universally stated in ocean bills of lading.

No other Government form is provided for use in ocean transportation. The use of this form is a makeshift.* At any rate it obviously was not specially prepared with a view to customs and practices peculiar to ocean transportation. Hence it is ignoring realities to endeavor, as the Government and the majority of the Court below attempted, to spell out of language in the bill of lading, either in the "Conditions" or "Instructions", any specific intent to avoid the "freight earned on shipment" provision customary in and peculiar to ocean transportation.

Furthermore, upon analyzing the "Conditions" which alone form the contract of the parties, it becomes apparent that there was no intention to avoid the "freight earned on shipment" provision of the carrier's commercial form of bill of lading.

Condition 1 is obviously designed to avoid any delay in the transportation of Government goods. The stipulation against prepayment of charges is clearly to avoid the goods being held up until payment of freight in advance is obtained. As pointed out by the petitioner in its

* This appears to be confirmed by the fact that no special space is provided on the face of the Government form to show cubic measurement of the goods as is often necessary in ocean transportation. It is noted, however, that apparently as an afterthought a footnote was added giving the following instruction: "Show also cubic measurement for shipments via ocean carrier in cases where required."

brief, unless it were so provided the time required to clear such payments through the Government's cumbersome disbursing system would cause untold delays in the transportation of the goods. The Government attempts to put significance on other language in Condition 1 which forbids collection of charges from the consignee and thus deprives the carrier of its lien for freight. This, too, obviously was designed to avoid delay in the transportation and delivery of the goods for if the carrier could hold them subject to a lien the transportation of the goods would also be interrupted. It is straining the language and purpose of Condition 1 far beyond its obvious import to say it had any effect on the nature of the obligation to pay freight. It is clearly a provision to expedite transportation of Government cargo and to avoid delay at the time of shipment by stipulating against prepayment and at the time of delivery at destination by stipulating against the carrier's lien.

Condition 2 imports into the contract of the parties "the same rules and conditions as govern commercial shipments made on the usual forms provided therefor by the carrier", unless the parties otherwise specifically provide.

It is of great significance that the bill of lading specifically provided which of the conditions governing commercial shipments should not apply in the case of loss of the goods, which is the situation here. Condition 7 specifically states that in case of loss, "the rules and conditions governing commercial shipments shall not apply as to period within which notice thereof shall be given the Carriers or to period within which claim therefor shall be made or suit instituted." Having thus dealt specifically with what commercial rules were to be excluded in case of loss of the goods, it must be assumed by elementary principles of construction that the rules governing the obliga-

tion to pay freight in case of loss of commercial shipments were not excluded and were to govern shipments made under Government bills of lading. *Manners* v. *Morosco*, 1919, 258 Fed. 557, 560; *Freston* v. *Lawrence Cement Co.*, 155 N. Y. 220; Corpus Juris, Secundum, Vol. 17, page 730.

Also, inconsistently with the Government's contention that, by implication, the Government bill of lading abrogates the "freight earned on shipment" provision of the carrier's commercial form, Conditions 3 and 5 show that the Government in shipping goods was seeking "the lowest rate" available even where that entailed a "restricted or limited valuation" of the goods.

Obviously ocean carriers would not apply the "lowest rate" to shipments on which, contrary to their established rules, the freight was at their risk in case of loss.

The Government puts much stress on the language of "Condition 1" to the effect that freight will be paid on the presentation of the bill of lading "properly accomplished". It contends these words are to be interpreted in the light of "Instruction 2" which provides that a certificate of delivery shall be executed by the consignee. This, the Government contends, is what is meant by "properly accomplished" and without it no freight is earned.

In this connection it is to be noted first that the instructions form no part of the contract. Secondly, nowhere in the bill of lading is there a definition of "properly accomplished". In the third place, the bill of lading does not provide that payment will be made *only* in the event the certificate of delivery is signed, or *only* in the event the bill of lading is "properly accomplished".

Further, "Instruction 2" does not purport to define what "properly accomplished" means. It merely says that after the signing of the delivery certificate and surrender of the bill of lading it "then becomes the *evidence* upon

which settlement for the service will be made". It does not say this is the "only evidence" on which it will be made.

Condition 1 and Instruction 2 merely state, in effect, that payment of freight will be made on compliance with certain formalities. Neither purports or could properly be considered to deprive the carrier of the right to freight under all other circumstances.

On the other hand, the word "accomplished" has a definite usage and meaning in connection with ocean bills of lading as pointed out in petitioner's brief and in the opinion of the trial Court. The trial Court aptly stated it as follows:

> "The word 'accomplished' when used in association with the term 'bill of lading' has had a meaning in mercantile circles which goes back to the time when a bill of lading was prepared and signed in a set. It was customary to insert in bills of lading drawn in sets the provision that one of them 'being accomplished, the others to stand void'. The duty devolved on the master to make delivery to the rightful owner and if he had no knowledge that any other part of the bill of lading, other than the part presented, had been indorsed, he could 'properly and safely deliver in accordance with the indorsement and holding of the part presented, without inquiry as to the other'. Carver on Carriage of Goods by Sea, Sec. 502. 'If upon one of them the shipowner acts in good faith, he will have "accomplished" his contract, will have fulfilled it, and will not be liable or answerable upon any of the others.' *Glyn* vs. *East & West Indian Dock Co.* (1882), 7 A. C. 591 at p. 599, cited in Sec. 55. See G. H. M. Thompson, Bills of Lading p. 211, where he uses the word 'executed' as meaning the same thing as 'accomplished'—'One bill being executed, the others to be void'. See also Leggett, Bills of Lading p. 569; and Duckworth, Charter Parties and Bills of Lading page 74."

Thus it will be seen that

1. The Government bill of lading is largely a skeleton incorporating as its main provisions the "same rules and conditions as govern commercial shipments".

2. It does not contain any provision expressly overriding the "freight earned on shipment" provision of the carrier's commercial form.

3. It cannot be held to do so by implication in the case of goods lost, because it dealt expressly with such cases and only excluded application of the commercial rules relating to notices of loss and the time for filing claims and suits (Condition 7).

4. Any attempt to interpret the language of the "Conditions" by reference to the "Instructions" is not justified since the latter were designed only to facilitate auditing.

5. Finally, there is no language in either the "Conditions" or "Instructions" which require the inference for which the Government contends.

POINT II.

IF IT BE THOUGHT THERE IS ANY AMBIGUITY IN THE CONTRACT IT MUST BE CONSTRUED AGAINST THE GOVERNMENT, THE PARTY BY WHOM IT WAS DRAWN.

In the event of ambiguity, it is fundamental that in construing a contract it is to be construed strictly against the party by whom it was prepared or drawn. *Mutual Life Insurance Company of New York* v. *Hurni Packing Company*, 263 U. S. 167; *Moran* v. *Standard Oil Company*, 211 N. Y. 187, 196; *Gillet* v. *Bank of America*, 160 N. Y. 549; Williston on Contracts, Revised Edition, Vol. 3, §621.

The Government in its brief in opposition to the Petition for Certiorari referred to two cases where ambiguities in a bill of lading were resolved against a carrier. *Toyo Kisen Kaisha* v. *W. R. Grace & Co.*, 53 F (2d) 740; and *Pope & Talbot, Inc.* v. *Guernsey-Westbrook Co.*, 159 F (2d) 139. These cases, however, show nothing more than the application of the general principle to particular circumstances. In both cases the bill of lading involved was prepared by the carrier. The language to be construed was the language employed by the carrier. If it admitted of ambiguity, under the fundamental and familiar rule, the ambiguity was to be resolved against the carrier as the author of the bill of lading. In this case the language to be construed is the language of the Government. The same fundamental and familiar rule requires that such ambiguity, if any there be, be resolved strictly against the Government.

POINT III.

Revised Statute 3648 (31 U. S. C. §529) does not relieve the Government of its obligation to pay earned freight.

The Government also contends that because of Revised Statute 3648 (31 U. S. C. §529) its bill of lading must be construed to mean that freight is not earned unless and until the cargo has been delivered at destination for to do otherwise would violate the statute.

At the time in question the pertinent part of the statute read as follows:

> "Except as otherwise provided by law, no advance of public money shall be made in any case. And in all cases of contracts for the performance of any service, or the delivery of articles of any description, for

> the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment."

The Government argues that the statute means that in no case can it make payment under any contract in excess of the "ultimate benefit" it derives. It thus interprets "value of services rendered" to mean "ultimate benefit derived from the services". It is evident that the two are not equivalent and this is the fundamental fallacy in the Government's position. The word "value" as used in the statute clearly means price or amount payable under a contract since the section specifically mentions contracts for services and goods without limitation on these terms except as to the time when payments may be made.

In any case "value" and "benefit" are not synonymous for the law abounds in examples, which need no citation of authority, where the value of services is not measured by benefit conferred. A lawyer may have his fee though he lose his case, a broker his commission though the goods do not arrive, and a gardner his hire though the rains wash away the fruits of his labor. The test is whether one has done that which he contracted to do and not the benefit conferred.

It is noteworthy that, so far as can be found, in the century and a quarter during which the statute has been in effect only once previously has the Government suggested that because of this statute "ultimate benefit derived" measures its contract obligations. Such a contention was made in *McClure* v. *United States*, 19 Ct. Cl. 173 (1884), but the Court held the claimants were entitled to recover "although the Government may not have received any benefit in consequence of the destruction of the subject matter of the agreement".

Applied logically, the Government's contention would require the fruits of every contract to be separately examined to determine the extent of the Government's obligation or whether it had any at all. Indeed it might well render it impossible for the Government to carry on its normal and necessary functions and the Attorney General in his opinion reported 32 Ops. Att'y Gen. 433 (1921) suggested such possible consequences.

Furthermore, the expenses of the Government would presumably be increased for if, in this case, the freight was at the carrier's risk, the cost of transportation of other shipments for the Government would have to be increased to compensate for the assumption of such risk or the cost of insuring it.

In another instance the Attorney General suggested that a Government contract could be appropriately modified to enable the Government to make payments which were prohibited by the statute. 21 Ops. Att'y Gen. 12 (1894). It seems clear that he regarded the statute as prohibiting certain payments because the services contracted for had not been completed but he saw no objection to the parties modifying the service contracted for to make possible the payments.

The only pertinent inquiry, therefore, is what was the service for which the Government contracted. It contends, in effect, that it contracted for the carriage of the cargo from Mobile to Port of Spain and sound delivery there, *at all events and under all circumstances*. This, however, was not the contract, nor the service for which it bargained. It clearly appears from the carrier's commercial form bill of lading (incorporated in the Government form) that the carrier's undertaking was not absolute and unconditional. It was subject to a variety of contingencies any of which

would relieve it from further performance. It was for "service" so subject and so conditioned that the Government contracted and for such service it agreed to pay freight to be irrevocably earned and due when the goods were delivered to the carrier.

The voyage commenced but the vessel was torpedoed and sunk, one of the contingencies against which the contract provided. No further performance by the carrier was required or contemplated. It had thus fully performed the service for which the Government bargained and agreed to pay.

That the foregoing correctly describes the nature of the service to be rendered by the carrier was long ago recognized by the Comptroller of the Treasury in rendering an opinion on the liability of the Government for Ocean Freight Charges, whether the goods were delivered or lost enroute, under bills of lading containing provisions similar to those here involved. 24 Dec. Comp. Treas. 707 (1918). The then Comptroller said:

> "The liability of the Government for freight charges would therefore arise when the shipment is actually made, whether delivered to destination or lost with the destruction of the vessel.
>
> "Section 3648, Revised Statutes, prohibits payment in excess of the service rendered. Under the circumstances outlined in this case the service required to be performed and for which payment may be made is the delivery of the property to the consignee or an excusable failure to make such delivery, evidence of one or the other of which should be furnished."

As previously pointed out, this view prevailed as late as April 7, 1942, when the Comptroller General stated in his decision, reported in 21 Comp. Gen. 909 at 913:

"In any event, it would appear that where the carrier claims charges without showing delivery of the shipment it reasonably may be required to show what particular facts or circumstances it relies upon as relieving it from the duty to effect delivery and obtain receipt from the consignee, and to certify that so far as known the shipment would have been delivered but for such facts and circumstances. See decision of May 27, 1918, 24 Comp. Dec. 707."

That an ocean carrier's services and undertakings are not and for long past have not been absolute and unconditional but qualified in view of the hazards to be encountered has been fully recognized in this Court and in the Court below and a carrier's right to freight does not depend on sound delivery. *Allanwilde Transport Corp.* v. *Vacuum Oil Company*, 248 U. S. 377; *International Paper Co.* v. *The Gracie D. Chambers*, 248 U. S. 387; *Standard Varnish Works* v. *The Bris*, 248 U. S. 392; and *The Quarrington Court*, 122 F. (2d) 266, 268 (C. C. A. 2, 1941).

CONCLUSION.

The decision of the Court below should be reversed and the decision of the trial court reinstated.

Respectfully submitted,

L. de Grove Potter,
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Of Counsel:

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